No. 89-____

89-860

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

EARL R. BREES,

Petitioner,

v.

ROBERT E. HAMPTON, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND APPENDIX

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November 27, 1989

QUESTIONS PRESENTED

1. Whether genuine issues of material fact exist so as to preclude entry of summary judgment ten years following filing of cross-motions for summary judgment?

2. Whether the United States Civil Service Commission (now Office of Personnel Management) illegally exempted itself from compliance with Title 5, Code of Federal Regulations Part 713 for processing complaints of discrimination by Petitioner and all other persons against its Bureau of Personnel Investigations (BPI) before, and even after, remand of this case from the District Court.

3. At what point after filing a SF-171, Personal Qualifications Statement, would Mr. Brees (and equally all other persons seeking federal employment) become an "applicant for employment" entitled to to the protection of 5 CFR Part 713?

4. Whether Mr. Brees was denied full and fair hearings in the administrative process after remand from the District Court?

CERTIFICATE OF COUNSEL REQUIRED BY RULE 21(b) OF THE GENERAL RULES OF THE UNITED STATES SUPREME COURT

The undersigned counsel of record for the petitioner certifies that the following listed parties appeared upon the pleadings below:

I. As plaintiff (petitioner) herein:

Earl Roland Brees
Estate of Earl Roland Brees

II. As defendants (respondents) herein:

Robert H. Hampton, individually and as Chairman of the United States Civil Service Commission

Frederick B. Dents, individually and as Secretary of Commerce

Bert A. Gallegos, individually and as Director of the Community Services Administration (formerly the Office of Economic Opportunity)

Robert H. Drummond, Jr., individually and as Chairman of the United States States Civil Service Commission

Alvin J. Arnett, individually and as Director of Economic Opportunity.

Tracy E. Mulligan

Tracy E. Mulligan, Esquire

Attorney of Record for Petitioner

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INTRODUCTION

The administrator of the estate of the late Earl R. Brees hereby petitions this Court for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals,

entered on June 13, 1989, is reported at 872 F.2d 111 (D.C. Cir. 1989), and is presented in the Appendix ("App."), 5a, et seq. The petition for rehearing and the suggsetion for rehearing en banc, filed July 28, 1989, were denied by Orders dated August 29, 1989 and appear in the Appendices hereto at 3a and 1a, respectively. The opinion of the District Court for the District of Columbia, which the Court of Appeals affirmed, is not reported; unpublished opinion appears at App. 55a, et seq.

JURISDICTION

Jurisdiction over this petition obtains under Rule 20.2 of the Rules of this Court. Jurisdiction of the District Court was predicated upon 42 U.S.C §2000e-16.

STATUTES AND REGULATIONS INVOLVED

Petitioner's claims arise under the Civil Rights Act of 1964 as amended to include federal workers, 42 U.S.C. §2000e-16 and the regulations promulgated thereunder, which were the found at 5 C.F.R., Part 713. The relevant texts of these appear at App. 236a et seq. and _____ et seq., respectively.

STATEMENT OF THE CASE

This case arises under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e-16. Earl Brees, the petitioner, was a disabled veteran honorably discharged from military service in 1960. During the next six years, he obtained a college degree and worked from time to time in both federal civil service jobs and in the private sector. In 1967, Mr. Brees worked for a private travel company, Travel Consultants, Inc., as

controller. In May 1967, he signed checks drawn on his company's account, totalling over $80,000, all payable to "J.R. Bishop," his wife's maiden name. His company became aware of his action. On May 27, 1967, he was arrested for embezzlement; the charge was changed to forgery, and then to false pretenses. On September 15, 1967, Mr. Brees pled guilty to the misdemeanor charge of "attempted false pretenses." He received a one-year sentence (which was suspended), and was placed on probation for a year.

On June 8, 1967, Mr. Brees was hired by the Interior Department's Bureau of Land Management as an operating accountant, GS-9. He sought transfer to the Accounting Systems Branch, Finance Division, of the OEO. On May 25, 1967 (two days prior to his arrest), he had submitted an employment application to OEO.

Question 37 of the application asked: "Have you ever been convicted of an offense against the law or forfeited collateral or are you now under charges for any offense against the law?" Mr. Brees answered, "No".

On August 27, 1967, Mr. Brees was transferred from the Interior Department to OEO, where he was employed as a GS-11 accountant. On August 28, he signed an appointment affidavit ("Standard Form 61"), which contained the following question: "Since you filed [your] application resulting in this appointment, have you been arrested, charged or held by Federal, state or other law enforcement authorities for any violation of any Federal law, state law, county or municipal law, regulation or ordinance?" Mr. Brees responded, "No". On the same day his fingerprints were taken and a routine National Agency

Mr. Brees performed his job satisfactorily, and on October 22, 1967, he was promoted to a GS-12 position. On March 1, 1968, the Civil Service Commission notified the OEO Personnel Security Officer that the National Agency Check and Inquiry had revealed Mr. Brees' arrest record. On March 6, OEO requested that the Commission conduct "a full field" investigation of Mr. Brees.

By letter of June 27, 1968, OEO notified Mr. Brees that it proposed to remove him from his position because he had falsified his Standard Form 61. On July 19, after receiving his reply, OEO dismissed him, effective August 3. Beginning August 2, 1968, Mr. Brees sent letters contending that had he been black, he would have been granted rehabilitated offender status and would not have been fired.

He appealed to the then Civil Service Appeals Examining Office ("C.S.C. A.E.O.") which on January 21, 1969, it aside Mr. Brees' removal, on the ground that the Standard Form 61 he had signed in August required him to disclose only events that occurred after the date that OEO had received his initial application (which, although dated May 25, was not in fact received by OEO until August). On February 4, petitioner was reinstated to his position. At the same time, he received a letter, dated January 31, proposing his removal on different grounds (fraud and deception in obtaining federal employment, and criminal conduct). He was dismissed on March 5, effective March 7. Mr. Brees appealed within OEO and was given a hearing before a Hearing Committee in November and December 1969. The Committee unanimously recommended his reinstatement to a

less sensitive position, concluding in its report of March 6, 1970 that OEO's action in discharging him a second time was "not taken in good faith." The Committee found that "[r]ather than reinstat[ing Mr. Brees] and try[ing] to live with the situation, OEO made the decision to terminate him again, come what may," even though Mr. Brees was a "superior worker." The Hearing Committee concluded:

> We find that the underlying cause for the second discharge was the agency's hostility to Mr. Brees which had built up since the first discharge and which he had exacerbated by his victory at the Civil Service Commission. We find that the agency rationalized its predetermined decision not to reinstate [Mr. Brees] * * *.

On March 31, 1970, however, OEO issued a final agency decision sustaining the discharge, but on the ground of criminal conduct.

Mr. Brees again appealed to the Appeals Examining Office, which rescinded OEO's decision and remanded the discharge case to the agency with instructions to process several discrimination complaints that Mr. Brees had filed, but that OEO had not yet acted upon. This agency delay violated regulations requiring that discrimination complaints be processed within 60 days in cases where hearings were not held, and within 90 days where hearings were held, see 5 C.F.R. § 713.218(a) (1969); 5 C.F.R. § 713.220(a) (1970). On January 21, 1971, the Commission's Board of Appeals and Review rejected OEO's appeal from the Appeals Examining Office decision, and on February 11, 1971, OEO began processing petitioner's discrimination complaints. An equal employment opportunity ("EEO") counselor was appointed in April 1971, and a report completed

in June. The EEO counselor stated that he could not determine whether OEO had discriminated against Mr. Brees on the basis of race, because the agency refused to make available the criminal records of black felons so that the treatment they received could be compared with that of Mr. Brees. Nevertheless, the counselor found that "the sequence of events point[s] quite strongly to the possibility of discrimination in the form of reprisals against Mr. Brees because he filed a complaint of discrimination." As support for his conclusion, the counselor noted that "[i]t is difficult to understand whe OEO would be unwilling to simply transfer Mr. Brees to a position unrelated to finance." On June 30, 1971, OEO requested the Commission to furnish an investigator for Mr. Brees' EEO claim against the agency, and on July 21, OEO was notified that an EEO

investigator had been obtained from the U.S. Information Agency.

Meanwhile, between May 1968 and February 1969, the Washington Area Examining Office of the Civil Service Commission received several applications for employment from petitioner. As was customary in such cases, the applications were referred to the Commission's Bureau of Personnel Investigatoin ("BPI") for a determination of the applicant's "suitabililty" for federal employment. On March 5, 1969, BPI issued a show-cause letter to Mr. Brees informing him that he had 15 days to reply to certain information which had surfaced during the investigation of his suitability. BPI received and considered Mr. Brees' reply. By letter dated March 28, 1969, Stanley N. Taylor, then Chief of the Division of Adjudication and Appraisal at BPI, notified Mr. Brees that on the basis

of his "dishonest conduct," his applications for federal employment had been rated ineligible.

On April 16, 1969, Mr. Brees appealed the rating to Kimbell Johnson, Director of BPI, who affirmed the decision, stating that "[b]ecause of the evidence and recency of your violation of the trust and confidence in employment, the Commission cannot at this time accept your applications for certification to government agencies for employment." Mr. Brees further appealed his rating to the Commission's Board of Appeals and Review, again raising the issue of racial discrimination. On June 3, 1969, the Board sustained the finding of the Director.

In July 1971, Mr. Brees and OEO officials began discussing the settlement of his claims against the agency. These negotiations culminated in an agreement

dated August 6, in which OEO promised to cancel Mr. Brees' second removal (dated March 7, 1969), and to reinstate him with back pay (some $19,000). Mr. Brees pledged to take annual leave from August 9, 1971, until October 19, 1971, and to take unpaid leave thereafter until September 6, 1972, at which time he would resign (unless he chose to do so earlier). Mr. Brees agreed that this was in settlement of his claims arising out of the personnel actions taken against him by OEO.

In the summer of 1971, Mr. Brees also became aware of a memorandum drafted by Stanley N. Taylor, Chief of BPI's Division of Adjudication and Appraisal, dated July 7, 1971, and addressed to his supervisor, Kimbell Johnson, Director of BPI. The Taylor memorandum contained allegedly defamatory information that would have damaged Mr. Brees' employment prospects.

For example, it said that he had been convicted in United States district court on the charge of false pretenses, while in fact he had pled guilty to attempted false pretenses in D.C. Superior Court. The memorandum went on to characterize Brees' appeals as "perver[sion] of the civil service appeals process, and commented that "it is absolutely asinine to state that Brees had been 'cleared' by anyone."

On October 28, 1971, Mr. Brees attempted to return to work at OEO and was refused. The next day, he attempted to withdraw his resignation, and this request was also denied by the agency. Mr. Brees then appealed to the Commission, alleging that his resignation was involuntary and that he should be allowed to withdraw it. The Commission determined on May 4, 1973 that the resignation was voluntary and that the agency had valid reasons for not

granting the withdrawal request. The district court later remanded the case to the Commission for a full hearing on the issue of voluntariness; the Commission affirmed its earlier decision that the resignation was voluntary.

In 1973, Mr. Brees applied for a temporary position as a computer specialist in the Office of Telecommunications at the Department of Commerce. While his application was being subjected to a pre-appointment check, the Department decided to abolish the position. Appellant charges that the Department acted after receiving false and unfavorable information about Mr. Brees from BPI through improper channels. The Department's Investigations and Inspections Staff conducted an investigation, and a hearing was held on September 18, 19, and

24, 1975. After evaluating all the evidence, the complaints examiner concluded on January 13, 9176 that "the agency's inaction with erspect to complainant's applications for various positions was unrelated to complainant's discrimination complaint," and recommended that Mr. Brees' complaint be dismissed. On appeal, the Department's Acting Assistant Secretary for Administration agreed. Later, a different complaints examiner appointed by the Civil Service Commission found that there was no evidence that any improper release of information by BPI was approved by BPI officials or even known to them.

In late 1973, Mr. Brees submitted additional applications for employment with Commission examining offices in Washington, Oklahoma City, Atlanta, Pittsburgh, and St. Louis. The Washington, Atlanta, and Pittsburgh of-

fices submitted requests to BPI for determinations of suitability, triggered by Mr. Brees' previous rating of unsuitability and his 1969 arrest. Between December 6, 1973, and January 4, 1974, and again between February 6 and 7, BPI conducted investigations of Mr. Brees' suitability. As a result thereof, Mr. Brees was invited to attend a meeting in April to offer any comments, explanations, or information he wished BPI to consider. Mr. Brees replied that on advice of counsel he preferred to respond via interrogatories rather than in person. By letter dated June 20, 1974, the Commission sent Mr. Brees a statement of information that required his comment, to which he replied on July 1. On June 27, 1974, Mr. Brees filed suit in the U.S. district court, and action on the suitability determinations was suspended until the U.S. Attorney later requested that they be

completed. In 1975, Mr. Brees received a positive suitabililty rating. In December 1973 and January 1974, Mr. Brees filed a series of EEO complaints against BPI and the Commission, alleging racial discrimination and reprisals against him for filing earlier complaints. The Commission initially took the position that 5 C.F.R §713.212(a) (1974) permitted complaints of discrimination to be filed against an agency only by its employees or applicants for positions within that agency, and did not authorize complaints such as the one Mr. Brees attempted to file directly against BPI. On November 19, 1975, however, the district court remanded the complaints to the Commission and ordered that they be processed. An investigation was conducted from January 5 through January 28, 1976. Efforts at informal resolution were unsuccessful, and by

letter of June 24, 1976, Mr. Brees requested a hearing on his allegations. The hearing was conducted on April 12, 21, 25-28, June 22, 27-29, and July 6-8, 1977. Mr. Brees was represented by counsel. The complaints examiner concluded that "[t]he evidence presented fails in each instance to show that the actions charged stem from discrimination and/or retaliation for earlier complaints," and recommended that a decision issue "that there was no discrimination and/or reprisal against Mr. Brees," On September 8, 1977, the Civil Service Commission announced its final decision in which it adopted the findings and recommendation of the complaints examiner.

The district court proceeding then resumed. After the Commission's decision on remand, Mr. Brees deposed a number of witnesses, and the government successfully

moved for a protective order. On January 18, 1978, the district court granted Mr. Brees' oral motion for leave to file a motion for summary judgment by February 20, 1978; Mr. Brees later sought and was granted extensions. During February and March 1978, Mr. Brees filed twelve motions for summary judgment, and on April 19, defendants submitted their response to petitioner's motions and moved for summary judgment as well. Over the next several months, the parties sparred over appropriate statements of stipulated material facts. On June 5, 1979, Mr. Brees moved to compel the Commission and OEO to file the complete administrative record; the defendants filed their response on July 11.

After six years had elapsed, on October 5, 1984, Mr. Brees requested a settlement conference and submitted a supplemental

memorandum of points and authorities in support of his still pending motions for summary judgment. The court on February 21, 1985, denied Mr. Brees' request to refer the case to a magistrate for settlement proceedings, and directed the parties to produce a complete administrative record, which record had been sent to storage by the office of the clerk, where, evidently, it was destroyed. Thereafter, on October 2, 1985, the court issued a memorandum and order directing Mr. Brees to show cause within 30 days why his complaint should not be dismissed with prejudice. Mr. Brees responded to this order on October 28, and two days later submitted an outline of the administrative record.

In 1987, Mr. Brees applied to this court for a writ of mandamus to order the

district court to issue its decision, and on May 1 of that year, more than nine years after the cross motions had been filed, the court of appeals denied the petition, commenting that "[w]e are confident that the district court will act with all due haste." In re Earl Roland Brees, No. 87-5086 (D.C. Cir. May 1, 1987); App. 53a. On July 2, 1987, counsel notified the district court that Mr. Brees had died. The following year, his estate sought another writ of mandamus, which was rendered moot when, on July 20, 1988, the district court granted summary judgment in favor of the defendants.

REASONS FOR GRANTING THE WRIT

I. GENERALLY: THE TEN YEAR DELAY

The import of this case arises from the inaction of the district court, in violation of statute, 42 U.S.C. §2000e-5(f)(4) and (5), for a period of ten

years: from March 1978 until June 1988. Brees v. Hampton, 877 F.2d 111, 116-117 (D.C. Cir. 1989); App. 49a-51a. It arises from the summary disposition effected by the district court on a 7,000 page administrative record. App. 84a. It arises from the death of Mr. Brees during the period of the district court delay. This is the classic case of justice delayed, justice denied. App. 7a, 51a.

The import further stems from numerous factual inconsistencies which both the district court and the court of appeals declined to view as integral to the claim of Mr. Brees, so as to force trial; instead both allowed the grant of summary judgment to the government. Its import also evolves from the rationalized approval, by both courts, of the government violating its own regulations, as well as statute.

II. Genuine issues of material fact abound: Petitioner's resignation from O.E.O. was involuntary and the August 1971 Agreement was voidable at petitioner's option.

The primary basis for the court of appeals affirming the district court in is case was the absence of any genuine issue of material fact in respect to the validity of the August 6, 1971 settlement agreement. App. 28a-29a. That agreement came about under the following circumstances: On July 22, 1971, the agency informed the petitioner that absent an order from the Civil Service Commission (C.S.C.), he would never again work at the Office of Economic Opportunity (O.E.O.). Further the agency stated that, provided the petitioner resign, it could reinstate him and restore to him his back pay from March 7, 1969, to date. Administrative Record, filed in the district court on or about 8 November, 1974, (hereinafter A.R.1.), pp.

224 and 286. Prior to August 5, 1971, O.E.O. requested the informal advice of the C.S.C. by and through its Office of General Counsel, regarding the validity of the proposed agreement to reinstate the petitioner and to restore to him his back pay, as aforesaid. Ad. Rec., filed 14 November, 1977, (hereinafter A.R.2), p. 1079. The Office of General Counsel of the C.S.C. informed O.E.O. that it believed such an agreement could be accomplished. A.R.2., p. 1080. The petitioner, by letters dated July 28, 1971, and July 20, 1971, tendered to the O.E.O. (The Office of its Director); the Equal Employment Opportunity Investigator appointed to investigate his complaints of discrimination by O.E.O.; and the C.S.C. (the Office of its Chairman) on July 30, 1971, statements of his belief that he was being coerced into executing

belief that he was being coerced into executing an agreement by which he was to be reinstated to his position at the O.E.O., restored his back pay and by which he was to tender his resignation at some future date, inter alia. A.R.1., p. 283. Both the district court and the court of appeals overlook this fact.

The court of appeals finds as a matter of fact that it was the petitioner two requested the settlement meeting. App. 32a. This appellate fact-finding discredits petitioner's contrary testimony to the effect that two agency personnel had told petitioner prior to July 22, 1971, that the agency had already decided to reinstate him, mostly because of the E.E.O. counsellor's activities. Ad. Rec. 2, pp. 1645-1649. And see report of E.E.O. Investigator Hunt, Ad. Rec. 2, pp. 232-238, which corroberates petitioner

in this. The idea of reinstatement came from EEO Counselor Hunt's dialogue with OEO management; not from Brees' suggestion, as the court of appeals finds. App. 32a. At a minimum, these differences underscore the existence of genuine factual issues. The O.E.O. prepared and executed the order for reinstatement and restoration of back pay on August 5, 1971. A.R.2., p. 397.

The next day, on August 6, 1971, the petitioner and the agency entered; into the Agreement by which the agency was to effect his reinstatement, restore his back pay pursuant to sub-chapter IX of the Back Pay Act, 5 U.S.C. §5596, and by which he was to resign and withdraw certain E.E.O. complaints then pending, while in turn the agency would withdraw its removal action against him. A.R.1, p. 315. All during the course of the negotiations which culminated in the Agreement of August 6,

1981, the petitioner was without representation by legal counsel.

During October of 1971, the petitioner decided to withdraw his resignation. At the administrtive hearing, held pursuant to the order of remand of the district court, the uncontradicted agency testimony was that the reasons set forth in the agency letter of November 12, 1971, as to why the agency would not allow him to withdraw his resignation were not the real reasons of the agency. Robert L. Trachtenberg, former Deputy General Counsel for O.E.O., engaged, in his testimony of 6 May 1976, in the following colloquoy:

> Mr. Mulligan: In view of the provisions of that regulation, [5 C.F.R. §715.202(b), of May 28, 1971] under what legal authority did the agency deny Mr. Brees' withdrawal of his resignation?

> Mr. Trachtenberg: The legal authority basically is as follows: This regulation says that the agency may decline the employee's request to withdraw his resignation, where valid reasons exist. The controlling reason in this case always was Mr. Brees' conduct, not his criminal conduct, but his conduct with the government officials that he had been dealing with, you know, throughout this process.
>
> You know I state, and I can't state it enough, you know, we were fully prepared at all times to go ahead on the adverse actions and on the discrimination complaint, but you know, Mr. Brees touched on the matter of libeling or threatening or whatever, harassing, that this was a way in which to resolve the problem and hopefully not have to deal with Mr. Brees further.... [A.R.2., p. 1002.]

On 10 May, 1976, Ernest Russell, Associate Director for Administration of the O.E.O. at all relevant time periods to the negotiation of the Agreement of August 6, 1971, and the signatory of said

Agreement on behalf of the agency, testified that the plaintiff

> had been employed -- he had difficulty - at least this would provide him with the record which showed that he resigned as opposed to being fired from the agency. It also would provide him monies to take care of his wife and his family because he hadn't worked in years sufficient to have the earnings that he had when he had been employed as a permanent employee of O.E.O. [A.R.2, p. 1280.]

Generally all resignations submitted during the summer of 1971 were governed by 5 C.F.R. §715.202, which read as follows:

> (a) General. An employee is free to resign at any time, to set the effective date of his resignation, and to have his reasons for resigning entered in his official records.
>
> (b) Withdrawal of resignation. Except as provided in this paragraph, a resignation is binding on an employee once he has submitted it. An agency, in

> its discretion, may permit the employee to withdraw his resignation at any time before it has become effective. An agency may decline a request to withdraw a resignation before it has become effective only when it has a valid reason and explains that reason to the employee. A valid reason includes, but is not limited to, administrative disruption or the hiring or commitment to hire a replacement. Avoidance of adverse action proceedings is not a valid reason. [33 F.R. 12482, Sept. 4, 1968, as amended at 36 F.R. 9675, May 28, 1971; emphasis supplied.]

The Federal Personnel Manual Supplement 752-1, sub-chapter S1, Paragraph S1-2a(2), set forth the C.S.C.'s own policy with respect to the voluntariness of an action, including resignation requested by an employee, as follows:

> The commission holds that an action requested by an employee is voluntary only if the employee has freedom of choice. The general principle is that an action is voluntary if the employee is free to choose, under-

> stands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date. [Emphasis supplied.]

The petitioner had asked the agency to allow him to resign as of September, 1973. The agency would not allow that date, and then the agency set the date of his resignation as September 6, 1972. The agency's policy, as quoted above, is written in the conjunctive: If any one of the criteria utilized to determine the voluntariness of an action is not met, the action must be considered to be involuntary. Further, 5 C.F.R. §715.202(a) specifically states that the effective date of a resignation is a matter the employee is free to set. The O.E.O. having set the date of the petitioner's resignation renders the resignation, ipso facto, an involuntary one.

The reasons set forth in the November

12 letter were, as noted above, not to be the real reasons; rather, "the controlling reasons in is case always was Mr. Brees' conduct, not his criminal conduct, but his conduct with the government officials that he had been dealing with, you now, throughout this process." Where the reasons for refusing an employee's request for withdrawal of his resignation relate to his behavior on the job, which behavior, as here, would constitute grounds for any adverse action, such reasons, pursuant to 5 C.F.R. §715.202(b), cannot be considered as "valid reasons." And see Decision Number NY752B70027, 15 November 1976, Federal Employee Appeals Authority. Another issue of fact exists for determination by the trier of fact.

The Agreement of August 6, 1971, sets forth the obligation of O.E.O. to reinstate the plaintiff to his position as

Systems Accountant, GS-510-12, on a date even with or subsequent to said Agreement. At the time of the execution of the Agreement, the agency had already, the day before, reinstated the petitioner. The court of appeals overlooks this fact. Further, by virtue of the C.S.C. A.E.O. order of August 17, 1970, the agency was under a legal obligation to investigate his Title VII claims and issue a new appellate decision, the earlier appellate decision having been rescinded. That order had been affirmed by B.A.R. on January 21, 1971. Further, the agency was under a legal obligation to comply, in good faith, with the C.S.C. A.E.O. order of August 1969 ordering petitioner's reinstatement which had been given only token compliance (one month).

The Agreement of August 6, 1981, in paragraph numbered Two (2), further "obli-

gated" the O.E.O. to restore the petitioner "all back pay to which he is legally entitled from the time of [his second] removal until the date of is reinstatement." This obligation of O.E.O. was in furtherance of the affirmation of the plaintiff set forth in paragraph numbered Six (6):

> this Agreement is in resolution of the adverse action [removal] taken by the Office of Economic Opportunity against Mr. Brees under Federal Personnel Manual 752....

The standard form by which the petitioner was restored to his position on August 5, 1971 -- one day before the execution of the subject Agreement -- identifies the authority by which the restoration of back pay was to be made as Sub-Chapter IX of the Back Pay Act. Under that sub-chapter (unless the predicates were such that the back pay to be restored was for

an involuntary act of the plaintiff) a back pay restoration had to be made pursuant to 5 U.S.C. §5596.[1] Sub-section (b) of that statute limits payment of retroactive compensation only to:

> [A]n employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal ... of all or a part of the pay, allowances, or differentials of the employee .... [Emphasis supplied.]

And see Opinions of the Comptroller General,

1/ In any event the back pay offered only settled the adverse action. The subsequent withdrawal of the E.E.O. complaint of plaintiff against O.E.O. pursuant to the fifth paragraph of the Agreement, in combination with the caveat that the Agreement was not to be construed as a finding of discrimination could not on August 5, 1971, be a valid predicate for back pay under 5 U.S.C. §5596(b), as the Agreement had yet to be executed.

B-185239 (October 8, 1976); B-180010.05 (January 2, 1976); and B-185239 (June 5, 1974). The agency never made such a determination as part of this Agreement, nor had such a determination been made by any other "appropriate authority." Past consideration is no consideration. "It of course goes without saying that a promise to do a thing which the promisor is already bound to do is not a good consideration upon which to found promise." Littlepage v. Neals Publishing Company, 34 App. D.C. 257, 264 (1910). And see, United States v. Bridgeman, et al., 173 U.S. App. D.C. 150, 523 F.2d 1099 (1975), regarding performance of an existing legal duty as constituting invalid consideration for a subsequent Agreement. Having reinstated petitioner and authorized back pay on the day before the Agreement was executed, no valid consideration existed for the Agree-

ment of August 6, 1971, and the Agreement is void or voidable at the option of the petitioner. The court of appeals addresses this issue, but finds no problem.

This point is further reinforced by the fact that whether a personnel action is unjustified or unwarranted can only be determined by looking to the factual predicate for that personnel action; it cannot be determined by events which take place two years later. Thus, when on July 22, 1971, the agency stated it could restore back pay, it had to be basing that decision that decision on the events underlying petitioner's second removal in 1969, not as the court of appeals speculates, some underfined procedural error. App. 38a-39a.

If events of two years earlier are the only possible basis for a determination of the unwarranted or unjustified

nature of the petitioner's removal, then it was impossible for the agency to bargain with the petitioner. Conversely, for petitioner to attempt to bargain with the agency on this point -- no matter what appearances the agency manifested in its negotiations with him -- was for the petitioner to engage in a useless act: The unjustified or unwarranted nature of the removal could not be altered by bargaining. The petitioner was either entitled to restoration and back pay, or he was not. The inability of the agency to bargain further vitiates the legal sufficiency of the consideration it offered to support the August 6, 1981 Agreement. In Colorado National Bank of Denver v. Bohm, 286 F.2d 494 (9th Cir. 1961), the court affirmed "the fundamental common law principle that consideration must be bargained for -- it must be

the thing which the parties agree shall be given in exchange for the promise." Id., p. 496. The agency was in no position to bargain. Again, the Agreement is void or voidable at the option of the petitioner.

There is also evidence that the agency overreached the petitioner in arriving at the August 6, 1971 Agreement. This is indicated by the fact that the agency knew of the financial difficulties of the petitioner and that he was not represented by legal counsel. Further, as the affidavits of Mr. Trachtenberg and Mr. Russell show, the petitioner had been informed that absent an order from the C.S.C. to the contrary he would not be restored to his position. This statement was made to petitioner even before the 5 C.F.R. §713.216 investigator had been appointed, formally, by the agency to

investigate the complaints of discrimination which the C.S.C., B.A.R. had directed the agency to investigate. In essence, the agency had predetermined the result of the B.A.R. ordered E.E.O. investigation; what more evidence of, at the least, a reprisal or retaliation for invocation of civil rights law is necessary.

Given these knowledges and behaviors of the agency as to the predicates to the Agreement of August 6, 1971, that Agreement for these reasons, too, is voidable at the option of the petitioner.

In order for an agreement to be enforceable, it must not be in violation of any statute, law or regulation; nor must it have as its objective an unlawful object. Jordan v. Axicom Systems, Inc., 351 F. Supp. 1134 (D.D.C. 1972). The Agreement of August 6, 1971, contained a

provision which made it "irrevocable." 5 C.F.R. §715.202 (1971)[2/] gives to the petitioner the absolute right to request the withdrawal of is resignation at any time before its effective date. The regulations allow the agency to reject an application to withdraw only if the agency can specify a valid reason to deny the request and explain that reason to the employee. In the instant case, the Agreement violates this regulation on its face, since it simply provides that it is "irrevocable." And as discussed above, the real reasons were not given to petitioner. As such, the Agreement is unenforceable since it violates a specific Federal regulation

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2/ The court of appeals, App. 39a-40a, asserts that certain language was added in 1973 to this regulation. The language at issue was added in May of 1971. The court erred as a matter of fact, and consequently, as a matter of law.

and the public policy articulated therein. Le John Manufacturing Co. v. Webb, 96 U.S. App. D.C. 161, 222 F.2d 48 (1955). Again, it is voidable at petitioner's option.

In sum, factual issues abound in respect to whether petitioner had the legal right to void the purported Agreement of August 6, 1971. Summary judgment was wholly inappropriate.

The Court noted that the "Appellant maintains that the background check of Mr. Brees conducted in 1968 and 1969 were discriminatory," and then adopts as dispositive the conclusions of the EEO complaints examiner "that neither the initiation nor the outcome of the 1969 suitability determination appears to have been either discriminatory nor regulatory." Yet the Administrative record shows that the initiation of the 1968 investigation was undertaken after BPI had first rejected Standard Form 85, used to request investigations for non-sensitive positions, which was properly executed by both Mr. Brees and Mr. Willis, and then accepted a SF-86, used only for "sensitive" positions, containing a false certification by Mr. Willis, Security Officer of OEO, that the position was "sensitive", and without the required signature of Mr. Brees. (Extract

of SF-86 is at Appendix, page 219a). This fraudulently initiated investigation was the basis for BPI's denial of "suitability" for the next six years, during which BPI disregarded the evidence of "rehabilitated offender" criteria established by CSC -- successful work experience, additional education, good conduct while living in the community, -- all of which Mr. Brees accomplished between 1967 and 1969 (Appendix, page 252a) and subsituted its own, unpublished criteria, applicable only to Mr. Brees, that Mr. Brees had shown no "remorse" for the offense, described above, a white collar crime which resulted in conviction of a misdemeanor, imposition of sentence suspended. The BPI position is clearly set forth in the "Taylor Memorandum", 7 July 1971, at Appendix, page 258a. Further, during that time, convicted felons, on work-release programs from

Federal and District of Columbia prisons, were being found "suitable" by BPI. Appendix, p. 227a. and infra.

Appellant respectfully submits that a "fair-minded jury could return a verdict for the appellant on the evidence presented."

The Taylor Memorandum, dated 7/7/71, (Appendix p. 258a), shows the animosity generated by appellant's repeated complaints of discrimination, against BPI.

Two years later, in October 1973, BPI blocked Appellant's employment at Commerce by telling their security officer that BPI "was considering debarring Brees." Testimony at the Commerce Hearing showed that Brees would have been hired by Commerce in October 1973 for one of the various positions he had applied for, ranging from grade 5 to Grade 12, absent that message from BPI. The Court erred in finding that

Brees' non-employment at Commerce was because the position he applied for had been abolished. That action was taken on Mr. Brees' application at the Bureau of Retirement and Occupational Health (BRIOH) an element of CSC itself.

From 1973 to 1975 BPI kept Appellant off all registers under their direct control (GS-5 through GS-12) by simply not completing the "Merit 13" investigation initiated in 1973. The Circuit Court found this innocuous delay. The testimony at the CSC hearing record showed that, absent intervention by the Justice Department (Letter January 10, 1975, Arnold T. Aikens, Assistant U.S. Attorney to Anthony L. Mondello, General Counsel, CSC, (Appendix, p. 215a) 267-268 BPI could (and inferentially would) have continued the "unsuitability" rating for the indefinite future, as shown by the following testi-

mony of Mr. George F. Mattox, Assistant Chief, Division of Adjudication, Bureau of Personnel Investigation, U.S. Civil Service Commission.

> Q [MR. MULLIGAN] * * * If the letter from the U.S. Attorney's Office had not suggested or advised the General Counsel's Office to continue with the process of his eligibility, is there any other mechanism in regulation procedure or practice that would have led the Bureau of Personnel Investigation to resume the processing of Mr. Brees' application?
>
> A [MR. MATTOX] I know of none.
>
> Q Is the letter that you have referred to by way of identification, a letter dated January 10th, 1975 * * *.
>
> MR. MATTOX: Yes, sir, this is the letter on Page 2 -- this was the direction to the Office of General Counsel that we proceed with the adjudication. On receipt of the General Counsel's file -- the file from them and I don't whether there was some instruction or not -- we proceeded with the adjudication.

The Circuit Court's conclusion that Mr. Brees was afforded an adequate remedy by the remand for hearings on his long-unprocessed complaints of discrimination against OEO and CSC is not supported in the record.

In neither of those hearings were stastical comparisons made, despite Mr. Brees' demands for this. Yet, anomalously, CSC demanded that the Commerce develop statistical comparisons before the Hearing was allowed to start, stressing that the statistical comparisons were vital to processing a discrimination complaint under 5 CFR Part 713. Letters from CSC (FEAA) to Commerce, twice demanding better statistics are at Appendix 239a and 245a.

In the CSC remand hearing (Ad. Rec. filed October 5, 1977), the Complaints Examiner accepted the statements of government witnesses, none of whom claimed any

expertise in computers, that statistical data was not maintained by CSC and a manual search of 3 to 5 million records would be required. She disregarded Mr. Brees' testimony that statistical data could readily be developed with only limited "manual" work from data already in the CSC computer systems, (Appendix, pp. 176a - 211a) explaining in detail how it could be done. Mr. Brees' qualifications included a Master's Degree from American University in the computer field, and employment in computer operations at OEO (Appendix, p. 252a). The Court adopted the Complaint's examiners' findings.

In the CSC hearing on remand deletions were made in the investigative file furnished Mr. Brees, although the complete file was forwarded to the Agency. The Complaints Examiner and the Court found this acceptable. Yet, contemporaneously,

the CSC, in implementing 5 CFR Part 713, had set aside a HUD decision because the complainant was not furnished the complete investigative file. The letter from Mr. Lowell, Deputy Executive Director of CSC, to Housing and Urban Development (at Appendix, p. 274a) was proffered by Mr. Brees in the CSC hearing as evidence of CSC policy, but was denied admission into evidence by the Complaint's examiner (Ad Rec. filed October 5, 1977, p. 667-669).

The OEO hearing on remand not only failed to include statistical comparisons, but by brazenly withheld testimony, condoned by the Complaints Examiner. One of the principal architects of the August 6, 1971 Agreement, was the Associate Director of Administration for OEO, Mr. Russell. He had also been designated to make the final decision on Brees' appeal within OEO. In a strange hearing scene, Mr. Rusell

was allowed to have a government attorney sitting in the witness box with him, whispering in his ear before he answered each question on cross-examination, "whether or not the witness recollected or did not recollect the answer". The hearing examiner, Mr. Streb, approved the procedure and allowed it to continue throughout the rest of Mr. Russell's testimony.

The following is from a transcript of the Hearing:

> MR. MULLIGAN: Therefore, I ask whether or not Mr. Werksman was with the Office of Economic Opportunity and may be a potential witness in this case.
>
> APPEALS OFFICER STREB: All right. Would you answer please?
>
> MR. WERKSMAN: [Attorney sitting in the witness box with Mr. Russell] I was in the Office of General Counsel of the Office of Economic Opportunity from 1964to 1967. At no time during

> that period did I have any connection with Earl Brees or this case.
>
> I was in the Office of General Counsel, again, from 1971 to 1972 at which time I had no connection whatsoever with this case. * * *
>
> I know nothing about the Brees case. I have given Mr. Russell no advice whatsoever in connection with what actually happened in the Earl Brees case.
>
> MR. MULLIGAN: Will you state for the record what you have been advising Mr. Russell on?
>
> MR. WERKSMAN: I have been advising Mr. Russell with respect to answering the questions whether he recollects or doesn't recollect and that is the only advice I have been giving him.
>
> APPEALS OFFICER STREB: All right. Let's proceed.

Ad. Rec. filed November 1977, pp.1238-1240.

The complaints against the Civil Service Commission and its Bureau of Personnel Investigations were never proces-

sed in accordance with 5 C.F.R., Part 713. The Complaints examiner on the CSC remand recited that the proceedings were to be conducted "as nearly as possible" in accordance with Part 713, but the appellant was never advised what rules applied.

The Civil Service Commission's General Counsel advised both the Executive Director of the Civil Service Commission and the Chairman of the Board of Appeals and Review that their position in refusing to process complaints of discrimination against BPI was untenable. App., p. 233a. The Commission did not change its position.

The Report and Recommendations of the Hearing Examiner, adopted in total by the Executive Director CSC stated as follows:

> Whether CSC discrimination against Mr. Brees by failing to accept and process his discrimination complaints against BPI.

Complainant alleges that this failure on the part of the CSC to accept and process his allegations of racial discrimination against BPI, which were not processed until this case was remanded from the District Court, is further evidence of dicscrimination and retaliation.

Evidence in the file in uncontroverted that it has been the historic position of the U.S. Civil Service Commission that someone who was not an employee or applicant for employment at the agency could not file an EEO complaint. Paragraph 1, page 2, IR Exh. 12 assumes it. The 8 May 1974 BAR decision on Mr. Brees' complaint spells it out in detail on page 3 (IR Exh. 23). Even the General Counsel's letter at IR Exh. 24, stating that the argument is not tenable accepts its existence.

Mr. James Scott testified at great length that at no time from 1969 to the present has it been the CSC policy or interpretation of 5CFR Part 713 that a non-employee, non-applicant for employment was eligible to file an EEO complaint under those procedures (TR 4/21/77, pp.

> 221-223; 4/25/77, pp 27-34, 37). Mr. Drummond also stated that his knowledge of regulations would preclude anyone in Mr. Brees' position from filing an EEO complaint directly against BPI under Part 713.
>
> The evidence is clearly that the CSC has uniformly interpreted its regulations that only an applicant for employment could file an EEO complaint with an agency and that the 713 procedure did not allow processing of a complaint directed against BPI, Bureau of Recruiting and Examining or any other component organization. Whether this is a viable or appropriate policy is not within the purview of a review performed by a Complaints Examiner. What was within the scope of his review is whether or not the policy as it existed was uniformly applied. It was.

In implementation of the Prisoner Rehabilitation Act of 1965 and the District Columbia Work Release Act of 1966 The Civil Service Commission had inter-alia established a program under the code name of "Project Start" for bringing

selected inmates and releases of Lorton reformatory into the Federal government on a transitional basis. After a transitional period of employment with the Federal government, it was officially anticipated that these employees would be converted to regular full-time career conditional employees and that the BPI would find them suitable. Successful job performance during the transitional period of work-release, usually 6 months or less, was deemed sufficient evidence of rehabilitation to justify a finding of suitability for employment as a "good risk" former offender. (FPM Chapter 306, Appendix, p. 222a et seq.) As noted below, there were approximately 100 inmates or releases of Lorton in this program.

Despite the refusal of the government to produce the records requested, the CSC hearing examiner did accept a newspaper

report of a minority felon employed by the Departme of Health, Education and Welfare, (Ad Rec.filed October 1977, p. 2614) which in part reads follows:

> Raymond L. (Filter Tip) Harris, Jr. has spent about half of his 32 years in prison. For the past 20 months he has been on parole. He is employed by the Department of Health, Education and Welfare and, for the first time in his life, he says, he has the opportunity to support his wife and five children in decency.
>
> But now, Raymond L. "Filter Tip" Harris, Jr. faces more trouble as a result of an incident arising out of an arrest for something he insists he did not do.
>
> On Wednesday, he was arraigned before U.S. District Judge Aubrey E. Robinson, Jr. on charges of assault with a dangerous weapon to wit a microphone, and destroying government property, to wit, the microphone."* * *

> His rehabilitation, which Harris says has become the focal point of his life, includes the job at HEW.
>
> But the long record, which runs the gamut from stealing automobile license tags to armed robbery, was always there.* * *
>
> * * *
>
> He allegedly threw the microphone in the direction of Margolis smashing the instrument. A microphone used in his manner is regarded as a dangerous weapon. * * *
>
> If he is convicted on either charge according to D. George Gates, Harris's attorney, Harris' parole could possible be revoked. Harris has a total of 27 years of backup time.

This same article (at AR-CSC 2615) describes the "Start Program", as follows:

> Under Start, former convicts are given the opportunity to go to work for the government. For four hours a day, they work at their jobs. For another four hours, they attend school (in Harris' case, it is Federal City College, where he is stud-

> ying business administration). Persons in Start are paid for eight hours of work, and Harris, who is a GS 4, up from GS 3, makes $6,544 a year in HEW's surplus property office.
>
> If he stays in the program three years, Harris can become a GS 9, making $11,000 a year and up.
>
> By his own account, Harris began to head himself towards eligibility for Start, which has about 100 former convicts in it in the Washington area, in 1967, when he got out of prison for 55 days after serving several years on assorted charges, including assaulting a policeman and carrying a pistol without a permit.

Although information on participants in Project Start for the purpose of statistical comparative analysis or other comparison to ascertain whether discriminatory treatment had been accorded to appellant by BPI was requested by the appellant, this information was withheld by the government with the concurrence of the hearing examiners.

The evidence to establish the disparate treatment or impact on Brees compared with the treatment afforded minorities in Project Start and other instances of the employment of former public offenders was peculiarly within the control of the government, and the government refused to release the information. Under the Federal Rules of Evidence the appellant is entitled to the presumption that the evidence withheld would be unfavorable to the government. See Huey v. The Department of Health and Human Services, EEOC No. 0183403 (Feb. 28, 1986) and Colquitt v. Turnage, Req. No. 05870528 (EEOC June 14, 1988). In the instant case, "unfavorable to the government" would mean that the withheld evidence could establish Mr. Brees' charge of discrimination, and entitle him judgment.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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